Supreme Court of the United States

OCTOBER TERM, 1941.

No.....

CEVAL NEAL,

Petitioner,

vs.

STATE OF MARYLAND.

BRIEF IN SUPPORT OF PETITION.

I.

STATEMENT OF THE CASE.

The statement of the case in the foregoing petition is, it is respectfully suggested, sufficient for the purposes of this brief and is hereby referred to and incorporated herein.

The issue raised in the nisi prius court was, first, the prosecution was initiated by a member of the Police Department of Baltimore City obtaining a search and seizure warrant and executing it (R. 83-4) during which property was seized; second, those arrested, including the petitioner here, moved that the search and seizure warrant be quashed, because it was issued without probable cause, in violation of the Federal Communications

Act, and in violation of the Federal and State Constitutions, and although this was admitted by the State of Maryland on demurrer, the quashing of the warrant and the return of the property seized was refused (R. 15-16, and 23-24); third, a motion to quash the indictment was made because evidence upon which it was founded was *unlawfully* and *illegally* obtained by a search warrant issued without probable cause, *without* due process of law, etc., which the State of Maryland admitted by its demurrer and the Court overruled the motion to quash the indictment (21-22, and 25-26). The search and seizure was admitted to be unlawful.

The Court of Appeals in its opinion states:

> "* * * Since 1929 evidence obtained by unlawful search and seizure has been inadmissable in trials of misdemeanors in the Courts of this State. Acts of 1929, ch. 194; Code, Art. 35, sec. 5; Heyward vs. State, 161 Md. 685, 694, 158 A. 897; Silverstein vs. State, 176 Md. 533, 540, 6 A. 2d 465. * * * It is accordingly now held in Maryland that if a search warrant has been issued without probable cause, bookmaking paraphernalia seized thereunder is inadmissible in evidence. Mazer vs. State, 18 A. 2d 217 * * *," (R. 161)

and after discussing the admissibility of evidence obtained by wiretapping and the right of a state to admit evidence obtained in violation of the Federal Communications Act concludes with, "The action of the trial judge was therefore correct in refusing to quash the indictment," (R. 163), entirely ignoring the motion to quash the search and seizure warrant and return the property seized thereunder in conformity with Code Art. 27, sec. 306, and that the warrant issued and executed was without probable cause and violative of the Constitutional guarantees both Federal and State.

II.

SPECIFICATIONS OF ERROR.

(a) The Court of Appeals of Maryland below erred in affirming the judgment and sentence imposed by the Criminal Court of Baltimore City (R. 9, Docket Entries, April 10, 1941).

(b) The Court below erred in refusing to consider, denying or ignoring the judgment of the Criminal Court of Baltimore City in sustaining the demurrer of the State of Maryland to the motions of the petitioner (and others) to quash the search and seizure warrant and restore the propery illegally seized thereunder (R. 9, Docket Entries, Oct. 1, 1940; R. 15-16; R. 7, Docket Entries, Feb. 10, 1941; R. 23-24), the ruling being in violation of *due process of law* and *equal protection of the laws* guaranteed to citizens of the United States under the 14th Amendment to the Constitution of the United States.

(c) The Court below denied to the petitioners here *due process of law* and the *equal protection of the laws* guaranteed to citizens of the United States under the 14th Amendment to the Constitution of the United States when it refused to consider, denied or ignored the motion of the petitioner to quash the indictment on the constitutional and factual grounds therein alleged and admitted to be true by the demurrer of the State of Maryland (R. 5, Docket Entries, Oct. 1, 1940; R. 17-18; R. 6, Docket Entries, Feb. 10, 1941; R. 21-22).

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Amendment XIV:

> "Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Maryland Code Public General Laws (Flack) Article 27 (Vol. 1, pages 1184-5):

> "306. Whenever it be made to appear to any judge of the Supreme Bench of Baltimore City, or to any judge of any of the Circuit Courts in the counties of this State, or to any justice of the peace in this State, by a writing signed and sworn to by the applicant, that there is probable cause, the basis of which shall be set forth in said writing, to belie that any misdemeanor or felony is being committed by any individual or in any building, apartment, premises, place or thing within the territorial jurisdiction of such judge or justice of the peace, or that any property subject to seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing, then such judge or justice of the peace may forthwith issue a search warrant directed to any duly constituted policeman, constable or police officer authorizing him to search such suspected individual, building, apartment,

premises, place or thing, and to seize any property found liable to seizure under the criminal laws of this State, provided that any such search warrant shall name or describe, with reasonable particularity, the individual, building, apartment, premise, place or thing to be searched, the grounds for such search, and the name of the applicant on whose written application as aforesaid the warrant was issued. If, at any time, on application to a Judge of the Circuit Court of any County or of the Criminal Court of Baltimore City, it appears that the property taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, said judge must cause it to be restored to the person from whom it was taken; but if it appears that the property taken is the same as that described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then said judge shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law."

Article 35 (Vol. 1, page 1592):

"5. No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case."

IV.

ARGUMENT.

The proceedings, which resulted in the conviction and sentence of the petitioner, were asserted to be violative of the guaranties of the Federal Constitution at the first opportunity after the indictment was filed (R. 5-6, Docket Entries) and maintained throughout. The motion to quash the search and seizure warrant set up that it was in violation of the Federal Constitution, (R. 15-16, 23-24), also in the motion to quash the indictment, (R. 21-22, 25-26) and in the final motion to quash after the verdict, (R. 31). The petitioner timely and continuously called to the trial court's attention that the search and seizure warrant was illegally and unlawfully issued and executed in violation of the Constitution of the United States and the Amendments.

The State of Maryland did not challenge in any instance this claim of the petitioner, the trial court contented itself with overruling or refusing the motions. When there was an attempt to establish that the Police Department had seized in execution of the search and seizure warrant the exhibits offered in evidence and the circumstances, this the trial court refused to allow, (R. 133 to 138) the evidence exhibited against the petitioner was obtained by a search, admitted on the pleadings to be illegal and unlawful, in violation of the guaranties in the Federal Constitution but when that fact was attempted to be established the petitioner was not permitted to show, at the trial, that the search was illegal, and, also, was not permitted to show that the evidence was procured under a search warrant at all, legal or illegal.

An eminent writer on search and seizure (Cornelius) has stated that the theory of our criminal proceeding, like that of Great Britain, is accusatory and not inquisitorial, (U. S. vs. James, 60 Fed. 257) and constitutional guaranties against being forced to give incriminating testimony must have a broad construction in favor of the rights which they were intended to secure (Counselman vs. Hitchcock, 142 U. S. 547).

This Court has construed that the constitutional guaranties, in the Federal Courts prohibit the admission of evidence obtained by an illegal search and seizure.

Boyd vs. United States, 116 M. S. 616.

This was not the rule in Maryland until the adoption of the Acts of 1929 ch. 194 now codified in Public General Laws (Flack) as section 5 of Article 35 which declares inadmissible evidence, in misdemeanors, procured by any illegal search or seizure prohibited by the Declarations of Rights (of Maryland) or the effect of which would be to compel one to give evidence against himself. The new rule is recognized and construed now to be the law of Maryland and of this case.

Opinion (R. 161).

The new rule, conforming to the Federal doctrine, was further entrenched and clarified by the Act of 1939 ch. 749 codified in Public General Laws (Flack) Article 27, section 306, where after prescribing for the issuance of search warrants, it was provided that property seized without probable cause, on application to the judge, must be by him "restored to the person from whom it was taken".

> "We are not unmindful of the fact that the question as to the admissibility of evidence secured under

and by virtue of what is conceded to be an illegal search warrant, has given rise to much conflict of opinion between the Appellate Courts of many of the States of this country. And that in Meisinger vs. State, 155 Md. 195, 141 A. 536, after a careful review of the authorities, affirming the decision in Lawrence vs. State, 103 Md. 17; the conclusion adhered to was that whenever evidence offered in a criminal trial is otherwise admissible, it should not be rejected in the Courts of this State because of the manner of its obtention.

"However, since that decision, by the passage of Chapter 194 of the Acts of 1929, now codified as Section 5 of Article 35 (Flack's Code 1939): 'No evidence in the trial of misdemeanor shall be deemed admissible where the same shall have been procured by, through or in consequence of any illegal search or seizure or of any search or seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would compel one to give evidence against himself in a criminal cause.' The validity of Section 5 of Article 35 is not questioned in the instant case, and for the purposes of these appeals must be assumed. 11 Amer. Jur. Constitutional Law, Section 125; 59 C. J. 621. And in view of that legislation, therefore, the cases of Meisinger vs. State and Lawrence vs. State are no longer controlling upon the question here involved.

"Officers of the law are entitled to the full support of the Courts in their endeavors to bring to justice those who transcend the law. In periods of world-wide discord, crime gains its greatest impetus, and all the more that observation becomes apparent. However, regardless of that statement, we must be bound by constitutional limitations designed to protect the citizen from unreasonable search and sei-

zure, found in the Fourth Amendment to the Federal Constitution, and in Article 26 of the Declaration of Rights of this State."

Mazer vs. State and Minikin vs. Same (Md., 1941) 18 Atl. 2d 217.

The motions to quash the search and seizure warrants because without probable cause and in violation of the Federal Constitution, (R. 15-16, 23-24) and the motions to quash the indictment because violative of the Federal Constitution and without probable cause (R. 17-18, 25-26, 30) and to restore the property seized were not traversed by the State of Maryland, but were refused or overruled by the Court. The petitioner here was given no opportunity at that or at any other time to establish the truth or verity of the motions or the constitutional questions involved.

The petitioner here was denied the right to raise the question of the protection and guarantees afforded him under the Fourteenth Amendment to the Constitution of the United States. The search and seizure warrant was admitted to have been obtained *on no probable cause,* the introduction of evidence obtained on its execution was allowed, in violation of the law (Md. Code Art. 35, sec. 5) the trial court refused to order the property seized restored in violation of the law (Md. Code Art. 27, sec. 306) and when the petitioner attempted to introduce the search and seizure warrant and the manner of its being procured and the method of its execution this right was denied to him.

The Maryland statutes are fair in their language and import, but the plain mandate set forth was brushed aside by the trial court and the Court of Appeals of Maryland in this case ignored their existence and appli-

cation. The laws promised protection, but the Courts, nisi prius and appellate, failed to apply and enforce the petitioner's rights.

The Federal guaranty of due process extends to state action through the judicial as well as through the legislative, executive or administrative branch of government.

Brichenhoff-Ferris vs. Hill, 281 U. S. 673.

> "It is the petitioner's contention that his conviction was based on an indictment obtained in violation of the provisions of the Fourteenth Amendment that 'No State shall * * * deny to any person within its jurisdiction the equal protection of the laws' * * * that a conviction based upon an indictment returned by a jury so selected is a denial of equal protection is well settled and is not challenged by the State. But both the trial court and the Texas Criminal Court of Appeals were of the opinion that the evidence failed to support the charge of racial discrimination. For that reason the Appellate Court approved the trial court's action in denying petitioner's timely motions to quash the indictment. But the question decided rested upon a charge of denial of equal protection, a basic right protected by the Federal Constitution. And it is therefore our responsibility to apprise the evidence as it relates to this constitutional right * * * The Fourteenth Amendment requires that equal protection to all must be given—not merely promised."
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> Smith vs. Texas, 311 U. S. 128 at 129-130.

The petitioner, an employee of the B. & O. Railroad since 1916, was arrested at the execution of an illegal and unlawful search warrant on June 26, 1940 and because at the time and place there were seized racing forms, rundown sheet, betting paraphernalia, under the illegal search warrant, all these things on motion to

quash the warrant and restore the property (illegal, unlawful, issued without probable cause and in violation of the Federal Constitution), the trial court refused and at the trial before the jury allowed the same to be admitted in evidence against this petitioner as evidence of his maintaining a gambling or race betting establishment—compelling him, by virtue of the execution of an illegal and unlawful search warrant, to testitfy against himself.

The contention of the petitioner, the claim that the nisi prius court refused to carry out the plain mandate of the statute to return the property seized under the seach warrant issued without probable cause and in violation of the guaranties of the Federal Constitution the Court of Appeals of Maryland ignored.

The question was not that expounded in the opinion, (R. 161-163) whether the provisions of the Federal Communications Act of 1934 (48 Stat. at L. 652, 1064, 1103; 47 U. S. C. A. Section 605) rendered inadmissible in the Maryland Court evidence obtained by wiretapping, or whether that Act included intrastate as well as interstate communications, and the construction and application of that Act by this Court in Nardone vs. United States, 308 U. S. 338, and Weiss vs. United States, 308 U. S. 321. These cases were cited to the Court of Appeals of Maryland as persuasive of the trend of judicial decisions and consistent with the rule of the Maryland Court of Appeals in Roman vs. State, 175 Md. 547, quoting from Archer vs. State, 145 Md. 128:

> "* * * the seventeenth (exception) was to permit a witness to testify in reference to a conversation over the phone when he could not certainly identify the person with whom he talked. This ruling was erroneous."

The officer of the Police Department who made affidavit in connection with the procuring of the search warrant did not know and could not recognize the voice heard over the wire and could not know the identity or location of the speaker. This was argument to show the error of the trial court in its ruling.

The position of the petitioner here is, when you question the validity of the proceeding on being violative of the Federal Constitutional guaranties and on other grounds, you are deprived of proving the facts, by the state's admission on demurrer and the refusing of the motion by the trial court. When you question the admissibility of the testimony at the trial and attempt to show it was procured illegally and in violation of Federal Constitutional guaranties by the execution of an unlawful search warrant by virtue of which the evidence was obtained, the nisi prius court abouts face and says the State of Maryland does not claim the evidence is the fruit of an illegal or otherwise search warrant and further you cannot inquire or probe.

You are confronted with a confession of guilt by having being in possession of evidence of guilt seized by the Police Department and therefore you being guilty are deprived of showing the evidence admitted was obtained on a warrant issued in violation of the laws of the State in which it was executed, and, likewise, you are deprived of even whispering or hinting that any right guaranteed under the Constitution of the United States (due process of law or equal protection of the laws) has been violated, and not allowed in that behalf to enquire.

The State of Maryland has by enactment promised that evidence obtained by an illegal search warrant shall

not be used and you shall not be compelled to testify against yourself, and further promises if the officers of the State in their zeal procure a warrant without probable cause and seize the property possessed by you, it shall be restored to you. But these promises shall surely be broken; when the accused says the warrant is bad, the State of Maryland admits that, and when the accused says, you cannot convict me by the things taken from me under an illegal warrant, the State of Maryland replies who said anything about a warrant, we are not claiming these things, taken from you by which you confess your guilt, were seized under a warrant, you are guilty and these things prove it.

This contention the trial court and the Court of Appeals of Maryland approves.

This Court has stated it is not precluded by the verdict of a jury in a criminal prosecution from determining for itself whether a confession was improperly obtained, when the convicted person has seasonably asserted his constitutional right to have his guilt or innocence determined without reliance upon a confession improperly obtained.

Chambers vs. Florida, 309 U. S. 227.

If the use by the state of an improperly obtained confession of guilt to convict is a violation of due process of law, as it is, how much more is it a violation of due process of law to gain possession of property evidencing guilt under an illegal search warrant, and when that is alleged have the State admit it, but nevertheless offer the evidence and when objected to have the trial court rule "that because the State does not claim the evidence was obtained under a search warrant," the accused is pre-

cluded from showing it was obtained under a search warrant and that the warrant was illegally obtained and executed in violation of the Federal Constitution?

CONCLUSION.

That liberty may be preserved it has been enacted and adjudged that the citizen shall not be oppressed by unreasonable searches and seizures or compelled to give evidence against himself. The Constitution and Bill of Rights of Maryland promises that right and legislative enactment provides the procedure and method. When well meaning and overzealous officers of the State charged with apprehending crime violate these rights and the courts of the state ignore or refuse to preserve those constitutional guaranties and see to it that the accused is afforded the equal protection of the laws, the fundamental law of the United States—the Constitution and the Amendments which guarantee due process of law and equal protection of the laws to all—those justly suspected or accused as well as the innocent—and to that end we urge that the writ prayed for be granted.

Respectfully submitted,

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